

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

* * * * *

JOHN BRAATEN, AN INDIVIDUAL,

Plaintiff,

v.

NEWMONT USA LIMITED, A FOREIGN
CORPORATION,

Defendant.

3:15-cv-00174-LRH-WGC

ORDER

This case involves a claim under the Age Discrimination in Employment Act of 1967 (“ADEA”). Before the court is defendant Newmont USA Limited’s Motion for Summary Judgment. ECF No. 43. Plaintiff John Braaten filed a response (ECF No. 45), to which Newmont replied (ECF No. 48). The court will grant Newmont’s motion because (1) Braaten has failed to establish a *prima facie* case of age discrimination and (2) even if he had met this initial burden, Braaten’s failure to report his criminal charges to Newmont, among other factors, created a legitimate, nondiscriminatory reason for his termination that was not pretextual.

I. Background

Before his termination, Braaten was employed for over twenty-four years with Newmont, a mining company with operations in Nevada. Newmont promoted Braaten several times throughout his career, including his first supervisory foreman position in 1994. ECF No. 43 at 9. At the time of his termination, Braaten held the title of Underground Fixed Maintenance General Foreman and was fifty-four years old. *Id.* at 10.

Newmont’s employee code of conduct requires its employees to report to the company all legal charges they incur. *Id.* at 7. Specifically, the “Standards of Conduct and Corrective Action”

1 provide that “[i]n the event you are charged with or convicted of a crime you must report that
2 fact to your department and to your human resources representative within five (5) days of being
3 charged or convicted.” *Id.* (quoting ECF No. 43-1 at 9). It is undisputed that Braaten was aware
4 of these policies, as he signed forms throughout his employment acknowledging Newmont’s
5 policies and participated in the company’s “Annual Refresher Training” sessions in 2013 and
6 2014, which covered the reporting policy. *Id.* at 8–9. Additionally, Braaten received first-hand
7 experience with the policy in 2012, when two separate employees that Braaten supervised, Shaun
8 Forsberg and Lupe Macias, contacted him to report their DUI arrests. *Id.* at 9–10.

9 Nonetheless, it is undisputed that Braaten failed to report his own DUI charges to anyone
10 at Newmont. On April 3, 2014, Braaten left work early¹ at approximately 1:30 p.m. and
11 proceeded to a nearby casino in Spring Creek, Nevada, where he consumed alcohol. *Id.* at 11. At
12 approximately 8:00 p.m. that same day, Braaten crashed his car into the front lawn of a residence
13 in Spring Creek. *Id.* at 12. He was taken to a local hospital, and a blood draw later revealed that
14 Braaten’s blood alcohol content was 0.168. *Id.* It does not appear that Braaten was arrested at
15 this time.

16 Two days later, Braaten contacted his supervisor, Mine Maintenance Superintendent Bill
17 Burt, to inform him of the accident and resulting absence from work. Even after Burt directly
18 asked Braaten if he had anything to report, Braaten did not disclose that the accident was alcohol
19 related. *Id.* at 14 (citing ECF No. 43-2 at 24). Rather, Braaten stated that he did not want to
20 discuss anything related to the accident. *Id.*

21 Tauna Staples, a Newmont HR specialist, later contacted Newmont to explain his short-
22 term-disability benefits. *Id.* Braaten once again did not disclose that alcohol caused his accident.
23 Instead, he informed Staples that he wanted to use his paid time off (“PTO”) instead of short-
24 term disability. *Id.* When Staples asked Braaten why he would want to use PTO when he had this
25 benefit available to him, he simply affirmed that he wanted to use his PTO. *Id.* Nonetheless,

26
27 ¹ Newmont explains that Braaten did not have a set schedule, but he was covering for his own
28 supervisor, Mine Maintenance Superintendent Bill Burt, that day and was therefore acting
superintendent. ECF No. 43 at 11.

1 several weeks later, Braaten submitted a claim form to Newmont for short-term disability but did
2 not report that the accident was alcohol related. *Id.* at 15. Newmont’s disability benefits,
3 however, do not cover injuries stemming from unlawful alcohol use or criminal acts. *Id.* (citing
4 ECF No. 43-1 at 34). During his employment, Braaten acknowledged receipt of the benefits
5 policies (ECF No. 43-1 at 47) and has not argued that he was unaware of the policy exclusions²
6 (*see generally* ECF No. 45). Newmont approved Braaten’s disability claim and provided him a
7 total of approximately \$10,000 in benefits. ECF No. 43 at 18.

8 On June 2, 2014, the State of Nevada filed a criminal complaint against Braaten for
9 driving under the influence and willful injury to or destruction of property. *Id.* at 16. Warrants
10 were issued for his arrest, which Braaten learned of on June 9 and subsequently surrendered
11 himself. *Id.* At no point did Braaten report these charges³ to Newmont. *Id.* at 17.

12 On June 10, 2014, a local newspaper reported that Braaten had been arrested. *Id.* Shortly
13 thereafter, Newmont learned of his arrest from the report. *Id.* On June 26, Burt and other
14 Newmont officials met with Braaten regarding his charges. *Id.* When asked whether he was
15 aware of the policy requiring him to report criminal charges within five days, Braaten replied
16 “sure I did.” *Id.* (citing ECF No. 43-1 at 35–39). Braaten also acknowledged that he had been
17 reminded of the policy at the recent Annual Refresher Training. *Id.* at 18.

18 A management team eventually concluded that Newmont should terminate Braaten. *Id.*
19 Newmont has asserted that this decision did not consider Braaten’s age but rather the fact that he
20 violated company policy by not reporting the DUI charges and made a short-term-disability
21 claim even though he was ineligible for these benefits. *Id.* On July 7, the management team met
22

23 ² Rather, Braaten has argued that Braaten “drove” him to file for short-term disability by
24 informing him he needed to file for the benefit after he stated that he planned to use his PTO.
ECF No. 45 at 8.

25 ³ In his complaint, Braaten asserts that he was not *read* charges until August 5, 2014 (ECF No.
26 17 at 2), implying that he was not obligated to report his charges to Newmont until after this
27 date. However, as Newmont correctly argues in its motion, the State filed a criminal complaint
28 on June 2, which constituted charges against Braaten. ECF No. 32 at 16; *see also* Nev. Rev. Stat.
§ 171.102 (defining a criminal complaint as “a written statement of the essential facts
constituting the public offense charged.”). Braaten does not address this point in his response.

1 with Braaten to inform him of its termination decision and the basis of that decision. *Id.* at 19.
 2 During the meeting, Braaten did not claim he was being discriminated against due to his age.
 3 Two weeks later, Braaten met with Jack Henris, the General Manager of Operations, in order to
 4 appeal his termination. *Id.* At the conclusion of the meeting, Henris decided to uphold the
 5 termination. *Id.* Once again, Braaten did not mention age discrimination. *Id.*

6 Braaten's replacement after his termination was Todd Sullivan, who at the time was
 7 forty-four-and-a-half years old. ECF No. 43 at 20.

8 In March of 2015, Braaten filed suit in this court, alleging a single count of age-related
 9 discrimination.

10 **II. Legal standard**

11 Summary judgment is appropriate only when "the pleadings, depositions, answers to
 12 interrogatories, and admissions on file, together with the affidavits, if any, show that there is no
 13 genuine issue as to any material fact and that the moving party is entitled to judgment as a matter
 14 of law." Fed. R. Civ. P. 56(c). In assessing a motion for summary judgment, the evidence,
 15 together with all inferences that can reasonably be drawn therefrom, must be read in the light
 16 most favorable to the party opposing the motion. *Matsushita Elec. Indus. Co. v. Zenith Radio*
 17 *Corp.*, 475 U.S. 574, 587 (1986); *Cty of Tuolumne v. Sonora Cmty. Hosp.*, 236 F.3d 1148, 1154
 18 (9th Cir. 2001).

19 The moving party bears the burden of informing the court of the basis for its motion,
 20 along with evidence showing the absence of any genuine issue of material fact. *Celotex Corp. v.*
 21 *Catrett*, 477 U.S. 317, 323 (1986). On those issues for which it bears the burden of proof, the
 22 moving party must make a showing that is "sufficient for the court to hold that no reasonable
 23 trier of fact could find other than for the moving party." *Calderone v. United States*, 799 F.2d
 24 254, 259 (6th Cir. 1986); *see also Idema v. Dreamworks, Inc.*, 162 F. Supp. 2d 1129, 1141 (C.D.
 25 Cal. 2001).

26 To successfully rebut a motion for summary judgment, the non-moving party must point
 27 to facts supported by the record that demonstrate a genuine issue of material fact. *Reese v.*
 28 *Jefferson Sch. Dist. No. 14J*, 208 F.3d 736 (9th Cir. 2000). A "material fact" is a fact "that might

1 affect the outcome of the suit under the governing law.” *Anderson v. Liberty Lobby, Inc.*, 477
 2 U.S. 242, 248 (1986). Where reasonable minds could differ on the material facts at issue,
 3 summary judgment is not appropriate. *See v. Durang*, 711 F.2d 141, 143 (9th Cir. 1983). A
 4 dispute regarding a material fact is considered genuine “if the evidence is such that a reasonable
 5 jury could return a verdict for the nonmoving party.” *Liberty Lobby*, 477 U.S. at 248. The mere
 6 existence of a scintilla of evidence in support of the plaintiff’s position will be insufficient to
 7 establish a genuine dispute; there must be evidence on which the jury could reasonably find for
 8 the plaintiff. *See id.* at 252.

9 **III. Discussion**

10 The ADEA makes it unlawful for an employer “to discharge any individual . . . because
 11 of such individual’s age.” 29 U.S.C. § 623(a)(1). Under the *McDonnell Douglas* framework, the
 12 plaintiff carries the initial burden of establishing a *prima facie* case of discrimination. *McDonnell*
 13 *Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). If successful, the burden shifts to the
 14 defendant to articulate a legitimate, nondiscriminatory reason for its allegedly discriminatory
 15 conduct. *Id.* And if the defendant provides such a justification, the burden shifts back to the
 16 plaintiff to show that the defendant’s justification is a mere pretext for discrimination. *Id.* at 804.

17 As discussed below, the court finds that Braaten has failed to meet his initial burden of
 18 establishing a *prima facie* case of discrimination. While this alone would end the inquiry, the
 19 court will address, for the sake of thoroughness, why Newmont’s rationale for terminating
 20 Braaten is a legitimate, non-discriminatory reason that Braaten has failed to demonstrate is
 21 pretextual.

22 **A. *Prima facie* case**

23 To prove a *prima facie* case of age discrimination, a plaintiff must show that “he was (1)
 24 (1) at least forty years old, (2) performing his job satisfactorily, (3) discharged, and (4) either
 25 replaced by substantially younger employees with equal or inferior qualifications or discharged
 26 under circumstances otherwise ‘giving rise to an inference of age discrimination.’” *Diaz v. Eagle*
 27 *Produce Ltd. P’ship*, 521 F.3d 1201, 1207 (9th Cir. 2008) (quoting *Coleman v. Quaker Oats Co.*,
 28 232 F.3d 1271, 1281 (9th Cir. 2000)).

1 It is undisputed that Newmont terminated Braaten and that he was at least forty years old
2 at the time. The court will therefore only address the remaining elements.

3 **1. Braaten was performing his job satisfactorily**

4 Newmont argues that the court should consider Braaten's work performance up until the
5 time of his termination and should therefore consider his terminating event—i.e., the DUI-related
6 conduct. ECF No. 43 at 23. Newmont thus argues that, despite over two decades of positive
7 performance evaluations, Braaten's failure to report his DUI charges prevents him from
8 establishing that he was performing his job satisfactorily.

9 The court disagrees. The Ninth Circuit has disapproved of district courts examining the
10 terminating event in determining whether the plaintiff has made a *prima facie* showing of age
11 discrimination. *See, e.g., Decker v. Barrick Goldstrike Mines, Inc.*, 645 F. App'x 565, 567 (9th
12 Cir. 2016) (holding that the "court misapplied the *McDonnell Douglas* framework by confusing
13 the minimal showing a plaintiff must make at the *prima facie* stage with the more substantial
14 showing required at the pretext stage" after the court found that the terminating event precluded
15 finding that the plaintiff performed his job satisfactorily).

16 Because Newmont has not disputed that Braaten's work performance prior to his DUI-
17 related conduct was at least satisfactory, the court finds that Braaten has established this *prima*
18 *facie* element.

19 **2. Braaten was not replaced by a substantially younger employee**

20 "[A]n inference [of age discrimination] cannot be drawn from the replacement of one
21 worker with another worker insignificantly younger." *O'Connor v. Consol. Coin Caterers Corp.*,
22 517 U.S. 308, 313 (1996). In *France v. Johnson*, the Ninth Circuit held "that an average age
23 difference of ten years or more between the plaintiff and the replacements will be presumptively
24 substantial, whereas an age difference of less than ten years will be presumptively insubstantial."
25 795 F.3d 1170, 1174 (9th Cir. 2015), *as amended on reh'g* (Oct. 14, 2015). Several years before
26 *France*, the court "applied this presumption [in *Diaz*] and concluded that a 9.5 years' average
27 age difference between the workers hired and those laid off was insufficient to establish a *prima*
28 *facie* case of age discrimination." *Id.* n. 2 (citing *Diaz*, 521 F.3d at 1207).

1 Newmont argues that, because the age difference between Braaten and his replacement
2 was 9.5 years,⁴ the above-cited precedent prevents this court from finding that Braaten has
3 established this *prima facie* element. ECF No.43 at 25. Braaten counters that the Ninth Circuit
4 held in *Douglas v. Anderson*—a case decided decades prior to *France* and *Diaz*—that a five-year
5 age difference was substantially younger. ECF No. 45 at 4 (citing *Douglas v. Anderson*, 656 F.2d
6 528, 533 (9th Cir. 1981)). Braaten thus argues that, because these decisions are contradictory
7 panel decisions, none are binding upon this court.

8 The court agrees with Newmont. While the panel in *Douglas* found that the plaintiff
9 established a *prima facie* case, the case did not directly present the panel with the question of
10 what minimum age difference results in a replacement employee being significantly younger.
11 See *Douglas*, 656 F.2d at 533. Accordingly, the panel provided no analysis on this point. In
12 contrast, the *France* panel directly addressed this issue, discussing the position the majority of
13 circuit courts had taken and ultimately adopting the Seventh Circuit’s ten-year-age-gap
14 rebuttable presumption as the rule discussed above. *France*, 795 F.3d at 1174. The court
15 therefore finds that this holding applies in the instant case.

16 However, as the *France* court also held, an age difference of less than ten years does not
17 end the inquiry. *Id.* “A plaintiff who is not ten years or more older than his or her replacements
18 can rebut the presumption by producing additional evidence to show that the employer
19 considered his or her age to be significant. The plaintiff can produce either direct or
20 circumstantial evidence to show that the employer considered age to be a significant factor.” *Id.*
21 (citation omitted).

22 But as discussed in detail below, Braaten has provided no evidence of age discrimination.
23 He has therefore failed to rebut the presumption that the age difference between himself and his
24 replacement was insubstantial. Nonetheless, the final element of *prima facie* age discrimination
25 is disjunctive, and a plaintiff may satisfy it by either showing that he was “replaced by
26 substantially younger employees with equal or inferior qualifications *or* discharged under

27
28 ⁴ As discussed above, it is undisputed that Braaten was fifty-four years old at the time of his
termination, while his replacement Todd Sullivan was forty-four-and-a-half years old.

1 circumstances otherwise giving rise to an inference of age discrimination.” *Diaz*, 521 F.3d at
2 1207 (emphasis added) (internal quotations marks omitted). The court will therefore analyze
3 whether any circumstances surrounding Braaten’s termination create an inference of
4 discrimination.

5 **3. No circumstances give rise to an inference of age discrimination**

6 “An inference of discrimination can be established . . . by showing that others not in [the
7 plaintiff’s] protected class were treated more favorably.” *Id.* (internal quotation marks omitted).
8 In his operative complaint, Braaten alleges that other employees “with DUI charges who did not
9 timely report the charges to [Newmont] were not terminated” ECF No. 17 at 2. In his
10 discovery responses, Braaten identified Shaun Forsberg and Lupe Macias as two employees who
11 were charged with DUIs during their Newmont employment but were not terminated. ECF No.
12 43 at 26 (citing ECF No. 43-5). As mentioned above, Forsberg and Macias were two employees
13 who Braaten supervised and who reported their DUI arrests to him.

14 Newmont argues that the fact that these two employees were not terminated cannot create
15 an inference of age discrimination because both Forsberg and Macias reported their arrests, while
16 Braaten was terminated for failing to report his charges. Braaten did not respond to this
17 argument.

18 The court agrees with Newmont. Because Braaten has failed to identify even one
19 employee that was not terminated for failing to report criminal charges pursuant to company
20 policy, he has failed to satisfy his initial burden. And because he has also failed to alternatively
21 demonstrate that Newmont hired a substantially younger replacement, Braaten cannot satisfy the
22 fourth *prima facie* element. His claim therefore fails. The court will nonetheless address
23 Newmont’s reasons for terminating him.

24 **B. Newmont had legitimate, non-discriminatory reasons for termination**

25 The court finds that the undisputed facts of this case establish that Newmont had a
26 legitimate and non-discriminatory reason for terminating Braaten. First and foremost, he violated
27 company policy by failing to report that he was charged with a DUI and willful injury to or
28 destruction of property. Moreover, he made a short-term-disability claim and received

1 approximately \$10,000 in benefits even though he was not eligible for such benefits due to the
2 circumstances underlying his injury. The burden thus shifts to Braaten to establish that these
3 reasons are pretextual.

4 **C. Newmont's reasons for terminating Braaten were not pretextual**

5 "A plaintiff may demonstrate pretext in either of two ways: (1) directly, by showing that
6 unlawful discrimination more likely than not motivated the employer; or (2) indirectly, by
7 showing that the employer's proffered explanation is unworthy of credence because it is
8 internally inconsistent or otherwise not believable." *Earl v. Nielsen Media Research, Inc.*, 658
9 F.3d 1108, 1112–13 (9th Cir. 2011). "Where evidence of pretext is circumstantial, rather than
10 direct, the plaintiff must produce 'specific' and 'substantial' facts to create a triable issue of
11 pretext." *Id.* In assessing an employer's proffered reasons for terminating an employee, "courts
12 only require that an employer honestly believed its reason for its actions, even if its reason is
13 foolish or trivial or even baseless." *Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1063 (9th
14 Cir. 2002).

15 Braaten has not proffered any direct evidence of age discrimination and must therefore
16 rely on circumstantial evidence. He argues that he was a veteran employee with an accomplished
17 record and that his non-disclosure, which he refers to as "non-malicious" and "unintentional,"
18 did not harm or prejudice Newmont. ECF No. 45 at 6. He contends that "Newmont knew almost
19 immediately when the off-work accident occurred and [he] was hospitalized, that the accident
20 may have involved alcohol and did nothing to forewarn [him] of this." *Id.*

21 These arguments are without merit. It is undisputed that Braaten violated company policy
22 by failing to report his charges. Braaten's arguments merely attempt to call into question the
23 wisdom and appropriateness of Newmont's termination decision without actually demonstrating
24 that it was pretextual. Moreover, Newmont did not have a duty to forewarn Braaten that he
25 would violate the policy by not reporting his charges; the evidence demonstrates that he was well
26 aware of the policy and had numerous opportunities to report the charges.

27 Next, Braaten argues that he was released from the hospital on a limited basis in late
28 April and was ready to return to work but that Burt "told him to stay home." *Id.* at 7. Braaten

1 argues that a reasonable juror could conclude that this was a “bait-and-switch” technique meant
2 to replace him with a younger employee. This speculation is without merit and contradicted by
3 the record, as Braaten’s doctor submitted a note stating that Braaten was to “remain off work
4 until 9/1/14.” ECF No. 48 at 12 (citing ECF No. 48-1 at 2). Moreover, Newmont encouraging its
5 employee to remain home and heal from an accident does not speak to Braaten’s obligation to
6 disclose his charges to the company; Braaten could easily have called or emailed his supervisor
7 from his home.

8 Braaten also argues that “Newmont itself was confused on the ‘reasons’ for termination.”
9 ECF No. 45 at 7. He highlights an email sent from Newmont HR Manager Debbie Paparich to
10 another company executive in which she asks the latter for a “summary on why we
11 recommended a term[ination] for” Braaten. *Id.* (quoting ECF No. 43-1 at 46). Paparich’s email
12 continues to explain that “[t]he main concern expressed from Tom was that he was not clear on
13 the reason since it seems that Gary[,] Jack[,] and Ian had different versions.” *Id.* Braaten argues
14 that these varying reasons are evidence of pretext. Newmont counters that Paparich, in her
15 deposition, explained that the company’s code of conduct also requires employees to positively
16 represent the company and that the management team merely discussed whether Braaten’s
17 violation of this policy was also a factor warranting termination. ECF No. 48 at 15 (citing ECF
18 No. 48-1 at 10).

19 The court does not find that Paparich’s email is evidence of pretext. The response to her
20 email demonstrates that Newmont’s managers, in their private discussions, asserted the same
21 rationale for terminating Braaten that they presented to him and to this court—i.e., failing to
22 report his charges and filing for short-term disability.⁵ See ECF No. 43-1 at 45. The fact that
23 some managers also considered the issue of whether Braaten’s failure to positively represent the
24 company was also a factor contributing to his termination does not demonstrate pretext. Most
25 importantly, nothing within these emails demonstrate that Newmont took Braaten’s age into
26 consideration.

27
28 ⁵ Newmont managers also discussed other related issues, such as Braaten leaving work early the
day of his accident while he was covering for Superintendent Burt. ECF No. 43-1 at 45.

1 Braaten also argues that Newmont “drove” him to file for short-term disability after he
2 informed the HR specialist that he planned to use his PTO during his post-accident absence from
3 work. This argument is also without merit, as it is an HR employee’s role to inform other
4 employees of company benefits and this interaction in no way demonstrates pretext.

5 The court has also considered the remainder of Braaten’s arguments and finds that they
6 are equally meritless as those discussed above and do not demonstrate pretext. Moreover,
7 Braaten has failed to allege—let alone provide evidence of—a reason why Newmont would
8 suddenly, after a twenty-four-year career, discriminate against him due to his age.⁶ Accordingly,
9 even if Braaten had satisfied his initial burden of demonstrating *prima facie* age discrimination,
10 he has failed to overcome Newmont’s legitimate, non-discriminatory reason for terminating him
11 with “specific” and “substantial” facts that could create a triable issue of pretext. The court will
12 therefore grant Newmont’s motion for summary judgment.

13 **IV. Conclusion**

14 IT IS THEREFORE ORDERED that defendant Newmont USA Limited’s Motion for
15 Summary Judgment (ECF No. 43) is **GRANTED**.

16 IT IS FURTHER ORDERED that the clerk of the court shall enter judgment against
17 plaintiff John Braaten in favor of defendant Newmont USA Limited.

18 IT IS SO ORDERED.

19
20 DATED this 10th day of February, 2017.

21 
22 LARRY R. HICKS
23 UNITED STATES DISTRICT JUDGE
24

25 _____
26 ⁶ In his deposition, Braaten asserted that Newmont replaced him with a younger employee in
27 order to avoid providing Braaten certain retirement benefits. ECF No. 43-2 at 16. He did not
28 allege this issue in his operative complaint or address it in his response to Newmont’s motion for
summary judgement. Moreover, Braaten admitted in his deposition that his assertion was
“speculation” and that he had no evidence that Newmont managers took his retirement benefits
into consideration. ECF No. 43-2 at 17.